11-14-2001

Tenth Place: John Ashcroft, et al. v. Free Speech Coalition, et al.

Bobby Shukla

Hadara Stanton

TENTH PLACE

No. 00-795

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES, et al.,
Petitioners,

v.

THE FREE SPEECH COALTION, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

Round # 2, 7:45 p.m.
November 14, 2001

Bobby Shukla
Hadara Stanton
200 McAllister St.
San Francisco, California 94102
(415) 565-4600
Counsel for Respondents

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The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 198 F.3d 1083 (9th Cir. 1999).

STANDARD OF REVIEW

This Court reviews de novo statutory construction, First Amendment issues of law and the deferential standard given to Congressional findings. *Peretz v. U.S.*, 501 U.S. 923, 933 (1991), *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 525 (1984), *Bartnicki v. Vopper, aka Williams,* 532 U.S. 514, 521 (2001).

STATEMENT OF THE CASE

Preliminary Statement

This appeal concerns the constitutionality of the Child Pornography Prevention Act of 1996 ("CPPA"), which the United States Court of Appeals for the Ninth Circuit struck down as unconstitutional, because it violated the First Amendment and was overbroad and vague. Respondents include The Free Speech Coalition, a trade association of producers and distributors of adult-oriented materials; Bold Type, Inc., a California publisher of a book on nude beaches; Jim Gingerich, a New York artist of nude paintings; and Ron Raffaelli, a specialist in erotic photography (collectively, "Free Speech").

Free Speech originally brought suit against the Government in the United States District Court for the Northern District of California on January 27, 1997. (Joint Appendix ("J.A.") 1). Free Speech brought the action to permanently enjoin the Government from enforcing certain provisions of the CPPA. (J.A. 1-2).

Free Speech based its challenge to the CPPA on three grounds: 1) the CPPA is not narrowly tailored to further a compelling state interest; 2) the terms "appears to be" and

"conveys the impression" are unconstitutionally vague; and 3) the language of the CPPA is unconstitutionally overbroad. (J.A. 4-7).

In response, the Government brought a motion for judgment on the pleadings in the United States District Court for the Northern District of California. (J.A. 70). On August 12, 1997, the District Court granted the Government's motion. (J.A. 86). The District Court held that the CPPA was neither content based, vague nor overbroad, and was not a prior restraint on speech. *Free Speech*, 198 F.3d 1083, 1095. (9th Cir. 1999).

Free Speech appealed and the Ninth Circuit Court of Appeals reversed on December 17, 1999. (J.A. 87). The Court of Appeals held that the CPPA violates the First Amendment because it outlaws entirely fictional yet sexually explicit depictions of minors. *Free Speech*, 198 F.3d at 1083.

On January 31, 2000 the Government filed a Petition for Rehearing and for Rehearing En Banc which the Ninth Circuit denied on July 24, 2000. (J.A. 108); *Free Speech*, 198 F.3d at 1083. Free Speech responded to the Government's Petition for Rehearing and Petition for Rehearing En Banc on February 24, 2000. (J.A. 110). The Government filed for writ of certiorari on November 16, 2000. (J.A. 114). This Court granted certiorari on January 22, 2001. (J.A. 118).

Statement of Facts

In this case, the Court must decide whether the Child Pornography Prevention Act of 1996 ("CPPA") violates the Constitution's First and Fifth Amendments. (J.A. 2). Specifically, because the terms "appear to be" or "convey the impression" of minors ban sexually explicit material of youthful looking adults or fictional characters. (J.A. 2-3). The CPPA does not define or explain the meaning of "appear to be" or "conveys the impression" anywhere in the statute.

Also, producers who do not use any minors face prosecution whenever law enforcement determines that their material appears to promote or advertise minors. (J.A. 6). As a result, Respondents have withheld distribution of their productions out of fear of prosecution. (J.A. 18, 20, 21, 23). Respondents also fear punishment for the mere possession of these materials. (J.A. 20, 21, 23).

1. Prior and Existing Child Pornography Laws Protect Actual Children

Congress enacted the CPPA at the end of a series of legislative acts that regulate child pornography. The initial legislation, Protection of Children Against Sexual Exploitation Act of 1977 criminalized visual depictions of actual minors engaged in explicitly sexual conduct with knowledge of its commercial use. 18 U.S.C. §§ 2251-2253 (1994). Congress enacted this statute after finding that child pornography is "highly organized, highly profitable" and exploits "countless numbers of real children in its production." *Free Speech*, 198 F.3d at 1087. Soon after, the Supreme Court ruled in *N.Y. v. Ferber* that to prevent child abuse, legislation may prohibit dissemination of non-obscene sexually explicit depictions of minors. 458 U.S. 747, 753 (1982).

Congress's numerous attempts to ban child pornography have proven inadequate. Subsequently, along with the Supreme Court's ruling in *Ferber*, Congress enacted a series of laws designed to combat child abuse caused by their participation in child pornography. 198 F.3d at 1087-1089. In 1984, Congress made changes in the Child Protection Act that eliminated the *Miller v. Cal.* obscenity standard, added a commercial distribution requirement, and raised the age of minority from sixteen to eighteen. 413 U.S. 15, 37 (1973); 18 U.S.C. §§ 2251-2253. Then in 1988, after the 1986 recommendation of the Attorney General's Commission on Pornography, Congress passed the Child Protection and Obscenity Enforcement Act, which

required producers to create and maintain records of the identities and ages of the performers. 18 U.S.C. §§ 2251(A) (1994).

2. The CPPA Departs Radically From Federal Law

From the outset of this legislative chain, Congress defined its objective in terms of the protection of real children. *Free Speech*, 198 F.3d at 1089. In 1996, the CPPA marked a turning point in which the law shifted from a ban on the use of actual children, to include for the first time, youthful looking adults and computer-generated characters that appear to be minors. *Id.* Congress discussed the issue of the CPPA's constitutionality and ultimately ignored the warnings of the CPPA's possible unconstitutionality. (J.A. 52).

The Commissioner of the Attorney General's Commission on Pornography, Professor Frederick Schauer, testified before Congress that the language in the CPPA of "appears to be" raises Constitutional questions. (J.A. 52). Prof. Schauer is the Frank Stanton Professor of the First Amendment at Harvard University's Kennedy School of Government, and a visiting professor of law at Harvard Law School. (J.A. 52). Schauer, the primary author of the report, wrote in concurrence with over a dozen constitutional scholars about the unconstitutionality of the statute, and discussed the Supreme Court's reluctance to expand the current provisions into areas of new technology. (J.A. 52-53).

Several Senators agreed that this Court may find the CPPA unconstitutional. (J.A. 51-61). As Senator Biden pointed out, after weighing a number of factors, the *Ferber* Court's paramount concern was to protect children from the harm of their participation in child pornography, not on the effect of the material on the viewer. (J.A. 52). Senator Feingold also articulated the need to protect children forced to participate in child pornography. (J.A. 59). He stated, however, that for laws that ban child pornography to have any value "they must remain

within the permissible bounds of our Constitution." (J.A. 59). Senator Feingold opposed the CPPA because "unfortunately, as currently drafted, the underlying legislation . . . fails to meet this standard." (J.A. 59).

The CPPA defines child pornography in relevant part as:

> Any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means of sexually explicit conduct, where-
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
>
> (C) such visual depiction has been created, adopted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
>
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct...

18 U.S.C. § 2256(8) (Supp. 1996).

Congress warned that this Court may strike down the CPPA as unconstitutional. To defuse the anticipated constitutional objections to the CPPA, Congress included an affirmative defense to the CPPA. This defense requires an accused person to prove: 1) the alleged child pornography depicts an actual person or persons engaging in sexually explicit conduct; 2) each such person was an adult at the time the material was produced; and 3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct. Therefore, producers who can prove they only use adults in their material may still face prosecution based on a subjective standard of the materials promotion or advertisment. (J.A. 6).

In addition, this defense provides no defense at all to entirely computer-generated material because, by definition, such materials do not use actual persons in its production.

Respondents challenged the CPPA's constitutionality on the grounds that it violated their First Amendment rights. (J.A. 1-2). The District Court held that the CPPA was content-neutral and was not vague or overbroad. *Free Speech*, 198 F.3d at 1083. The Ninth Circuit reversed, holding that the CPPA is a content-based restriction on speech and that the provisions "appears to be" and "conveys the impression" of a minor violate the First Amendment because they are vague and overbroad. *Free Speech*, 198 F.3d at 1086. After an analysis of federal child pornography legislation, the court determined that the CPPA represented a substantial departure from previous laws. *Free Speech*, 198 F.3d at 1087-1090. The Ninth Circuit cited *Ferber*'s holding that child pornography is illegal in order to prevent harm to the actual children present during its production. *Free Speech*, 198 F.3d at 1092. The court concluded that the Government failed to demonstrate this "critical ingredient" that links depictions of youthful looking adults and fictional characters to child abuse. *Free Speech*, 198 F.3d at 1093.

3. Parties Affected by the CPPA

Free Speech is a trade association representing over 600 individuals and businesses in defending their First Amendment rights. (J.A. 3). The Free Speech members produce, distribute, present and sell non-obscene adult materials. (J.A. 3). These materials have so far been in full compliance with statutory regulations. Despite this, Free Speech fears that the CPPA's language will leave some of its materials without constitutional protection. (J.A. 4). Several members of Free Speech have filed affidavits that they only use adults in their materials, and yet, they fear prosecution under the CPPA. (J.A. 19-23).

Free Speech members fear that their artistic expression of adult sexuality as portrayed in photographs, films, television shows, books, magazines, and other artwork will wrongly subject them to criminal prosecution. (J.A. 2). Specifically, Free Speech members contend that the CPPA will unlawfully regulate as child pornography, images of youthful-looking adults and fictional characters engaged in sexual conduct. (J.A. 5). In addition, Free Speech fears that the CPPA will similarly target artificially generated images that do not involve minors in their production. (J.A. 6).

Free Speech does not challenge 18 U.S.C. § 2256(8)(A), which bans material depicting actual children engaging in sexually explicit conduct, nor do they challenge § 2256(8)(C), which bans computer generated images of identifiable children engaged in sexually explicit conduct. (J.A. 8). Free Speech opposes child pornography, and supports the Government in fighting the exploitation of children. (J.A. 2). In fact, Free Speech and its members actively assist in the eradication of child pornography. They offer, and have awarded in the past, cash rewards of up to ten thousand dollars to any person who provides information that results in the arrest and conviction of individuals involved in child pornography. (J.A. 3). Free Speech does not advocate or tolerate the production or distribution of child pornography involving real children. Nevertheless, the CPPA threatens Free Speech and its members because they produce, distribute and/or possess materials that do not use any minors, yet prosecutors may determine that they portray minors involved in sexually explicit conduct. The penalty for violating the CPPA ranges from a ten year prison term to execution. (J.A. 27).

SUMMARY OF ARGUMENT

This Court should invalidate the provisions of the CPPA that criminalize any depiction that "appears to be" or "conveys the impression" of minors engaging in sexually explicit

conduct. This Court has stated that valid restrictions on protected speech do not refer "to the content of the regulated speech . . . are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The Government has failed to demonstrate that the content-based restrictions the CPPA places on protected speech serve a significant state interest, that the CPPA is narrowly tailored, or that it provides for alternative methods of expression.

The *Ferber* Court strictly delineated the boundaries that constitute child pornography because restricting content-based speech in pursuit of a compelling Government interest requires a sensitive balancing test. 458 U.S. 747, 764. The Government pushes the Court's established boundaries by restricting speech protected by the First Amendment. This Court defined the boundaries of unprotected speech based on the Constitution's concern that individuals, not the Government, form and express "esthetic and moral judgments about art and literature." *US v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 818 (2000). Specifically, this Court stated that "[t]echnology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us." *Id.* Because the Government has not demonstrated a compelling interest in restricting this speech, it treads on constitutionally protected rights by restricting the production of material because it disapproves of the content. Furthermore, even if the Government could demonstrate a compelling state interest in restricting this speech, the CPPA is not narrowly tailored to address this interest, and therefore places a unconstitutionally categorical ban on protected speech.

For the same reasons the Government cannot demonstrate a compelling state interest in restricting this speech, the terms "appears to be" and "conveys the impression" are

unconstitutionally overbroad. These terms render a blanket suppression on First Amendment protected speech, which bans sexually explicit visual depictions that may appear to be minors to some, but that are entirely fictional or that portray youthful looking adults. Several members of Congress also expressed concern for the CPPA's encroachment on First Amendment rights at the time of its enactment. The CPPA further threatens these rights because it provides an affirmative defense that is unfair and ineffective because it necessarily excludes entire classes of artists and distributors from using the defense at all.

The provisions "appears to be" and "conveys the impression" also fail constitutionality for vagueness because they are not defined and do not give the ordinary person or law enforcement officials notice of prohibited conduct. For this reason, the CPPA's vagueness violates due process laws because of its failure to provide fair notice. As a result, these terms permit arbitrary and discriminatory enforcement of the statute. Finally, the CPPA's vagueness and overbreadth renders the statute ineffective and delays the protection of children.

ARGUMENT

I. THE CPPA IS UNCONSTITUTIONAL BECAUSE THE PROVISIONS OF "APPEARS TO BE" AND "CONVEYS THE IMPRESSION" BAN AN ENTIRE CATEGORY OF PROTECTED SPEECH.

As currently written, the Child Pornography Prevention Act of 1996 ("CPPA") bans the sexually explicit portrayal of adults who appear younger than eighteen and artificially generated images. 18 U.S.C. § 2256(8)(B), (D). In doing so, the CPPA violates the First and Fifth Amendments by banning an entire category of protected speech. The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The CPPA provisions abridge the freedom of speech by restricting sexually explicit images that are not child pornography as established by the leading case of *N.Y. v. Ferber*. 458 U.S. 747, 764

(1982). The Court in *Ferber* created a new form of unprotected speech, and in this case, the Government attempts to force these legal images of adults, or fictional characters, into that narrow category. 458 U.S. at 764.

A. The Government Does Not Have a Compelling Interest in Banning Non-Obscene Sexually Explicit Materials That Do Not Involve Actual Children.

The CPPA, unlike the statute in *Ferber*, is an unconstitutional content based restriction because it does not respond to a compelling state interest. The Government here fails to show the CPPA's justification "without reference to the content of the regulated speech." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (holding *de minimis* intrusions on speech acceptable as long as they are tailored to serve a substantial government interest and do not unreasonably limit alternative channels of communication). For the CPPA to validly restrict speech in compliance with the Constitution, the Government must demonstrate that the restriction has nothing to do with the speech's message. *Id.* The Government's failure to demonstrate that the CPPA is content neutral renders it "presumptively invalid." *R.A.V. Petr. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) (holding, as facially unconstitutional, an ordinance not narrowly tailored to further the compelling government interest of protecting the public safety and community against discriminating threats).

The content neutrality test questions whether the statute is narrowly tailored to promote a compelling government interest through the least restrictive means. *Clark*, 468 U.S. at 293. The Government has not met its burden for two reasons. First, the Government has not established a compelling interest that would allow it to restrict Free Speech's material. No evidence exists in the record that sexually explicit, non-obscene material produced without children has any effect on children. This Court requires a clear nexus between the restricted speech, and the harm that it supposedly causes. *Renton v. Playtime Theatres*, 475 U.S. 41, 51 (1986) (holding that an

ordinance restricting adult theatres satisfies the content-neutral requirements because it serves a substantial government interest and does not unreasonably limit alternative avenues of communication). Second, even if the government demonstrated a state interest, the statute is not narrowly tailored to further a compelling state interest, and therefore fails strict scrutiny.

When the Government has a compelling state interest, such as a legitimate interest to maintain children's safety and welfare, that interest may supercede rights protected by the First Amendment. *Ferber*, 458 U.S. at 763. This Court stated in *Ferber* that when a defined category of material harms the children used in its production, the First Amendment does not protect that material. 458 U.S. at 764. In doing so, this Court created an exception to constitutionally protected speech for child pornography. In this case, the production of these materials do not involve children, so they do not fall within the exception, and remain constitutionally protected.

The *de minimis* value of using minors in sexually explicit material does not apply to material that does not involve minors. The Government has failed to show that any harm results from non-obscene sexually explicit material that does not involve children. The *Ferber* Court suggested that instead of involving children in sexually explicit literary or artistic performances, "a person over the statutory age who perhaps looked younger" could perform when necessary. 458 U.S. at 763. The non-obscene sexually explicit portrayal of youthful looking adults has value, such as for artistic, literary, scientific or educational purposes. *Id.* Free Speech uses artificially generated images or adults to convey their artistic expressions, in accordance with the reasoning of *Ferber*. *Id.*

In their concurring opinion, Justices Brennan and Marshall point out that stretching the facts of *Ferber* even slightly would violate First Amendment rights. 458 U.S. at 776. They explained that, "in the absence of exposure, or particular harm, to juveniles or unconsenting

adults, the State lacks power to suppress sexually oriented materials." *Ferber*, 458 U.S. at 777. Similarly here, the Government has failed to identify a specific or "particular harm" to children, and yet attempts to restrict a broad category of protected speech.

B. The Reasons in Support of the Argument That These Materials Lead to Sexual Abuse of Children Are Unfounded.

To get around the CPPA's unconstitutionality, Congress argues that the CPPA aims not to restrict Free Speech's material, but rather to combat the secondary effects caused by this material. (J.A. 30). Congress bases this argument on the extensive facts that link child pornography to child abuse, and on the judicial reasoning of this Court in *N.Y. v. Ferber*. (J.A. 35). However, the *Ferber* Court aimed primarily to protect children involved in child pornography from abuse, as it reiterated many times in the opinion. 458 U.S. at 757-759, 761, 764. The Court in *Ferber* specifically addressed the harm to children used in child pornography, and the intrinsic relationship between child pornography and child abuse requires that the visual depictions involve actual children. 458 U.S. at 759. Congress has not provided any evidence linking non-obscene sexually explicit materials that do not involve children with sexually abuse of children.

Congress claims a nexus between sexually explicit materials that appear to involve children, but do not, and the actions of people who would exploit children. *Free Speech*, 198 F.3d at 1091. Congress, however, has not proven its claim that the harms to children making child pornography occur in other forms of protected sexual expression produced entirely without children. Even if a nexus between virtual pornography and harm to children existed, the Government targets the "potential conduct" of pedophiles, and fails to justify a categorical ban on adult forms of expression protected by the First Amendment. (J.A. 39). This Court stated that the Government cannot restrict speech simply to prevent "anticipated harms," but rather

"must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 664 (1994). To prevent child abuse, Congress must target illegal conduct, and not categorically ban protected expression because it might cause harm.

Unlike *Ferber*, where the Court addressed an actual problem, here the Government searches for a problem to justify a categorical ban. The Court in *Ferber* expressly stated that the use of children in pornography "is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment." 458 U.S. at 758. The Court requires the nexus between the ban on child pornography, and children's safety, which the Government cannot demonstrate in the current situation that does not involve children.

The Ninth Circuit rejected the Government's claim that any response pedophiles may have to images that "appear to be" of minors justifies the CPPA's restriction on speech. *Free Speech*, 198 F.3d at 1093. The court found that it unconstitutional to ban as child pornography, "foul figments of creative technology that do not involve any human victim in their creation or in their presentation." *Id.* No evidence exists that shows a correlation between technological images and any affect on children. Therefore, the Ninth Circuit concluded that "[a]bsent this nexus, the law does not withstand constitutional scrutiny." *Free Speech*, 198 F. 3d at 1094.

1. There is no basis for the argument that sexually explicit materials that portray youthful looking adults or artificially generated images whet the sexual appetites of pedophiles.

The Government also attempts to argue that sexually explicit material produced without actual could potentially harm children because pedophiles will use the material to seduce children, and to stimulate their appetites. (J.A. 40). This Court has already stated that

"[l]isteners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*," and furthermore "[t]he emotive impact of speech on its audience is not a 'secondary effect.'" *Boos v. Barry*, 485 U.S. 312, 321 (1988). Consequently, this argument fails to bolster the Government's claim of compelling interest to prevent a secondary effect.

The argument that pedophiles will abuse this material to harm children fails constitutional scrutiny for two additional reasons. First, nothing indicates that pedophiles use these materials to seduce children or to whet their appetites. The Government cannot pronounce this material "virtually indistinguishable" from child pornography. (J.A. 38). Second, this argument applies to any material, including sexually explicit non-obscene portrayals of adults as well as non-sexual depictions of children. Affirming this argument would lead to a ban on any speech that potentially has negative consequences.

In her concurring opinion in *Ferber*, Justice O'Connor raised the possibility "that New York's statute is overbroad because it bans depictions that do not actually threaten the harms identified by the Court." 458 U.S. at 775. Likewise, the CPPA bans images that do not cause the harms of child pornography. This Court has recently stated that regulating content based speech with the purpose of shielding "the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists." *U.S. v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 813 (2000). In that case, the Government failed to prove that the content-based statute was narrowly tailored to serve a compelling Government interest, and because a less restrictive alternative existed, this Court held the statute violated the First Amendment. *Playboy*,529 U.S. at 827.

Allowing Congress to prohibit speech based on what a listener might to with that speech goes directly against the First Amendment. *Playboy*, 529 U.S. at 812. The Ninth Circuit

determined that "[m]any innocent things can entice children into immoral or offensive behavior, but that reality does not create a constitutional power in the Congress to regulate otherwise innocent behavior." *Free Speech*, 198 F.3d at 1094. According to the Government's argument, this creates a slippery slope making popular films, magazines or even clothing catalogues illegal because they might entice a child to do something that others may find objectionable. The Ninth Circuit concluded that the CPPA criminalizes "disavowed impulses of the mind," as manifest in "illicit creative acts" and concluded that "censorship through the enactment of criminal laws intended to control an evil idea cannot satisfy the constitutional requirements of the First Amendment." *Free Speech*, 198 F.3d at 1094.

2. The economic motive that furthers child pornography does not pertain to materials that do not depict actual children.

Congress should limit the CPPA to protect children, instead of making the lawful conduct of law-abiding adults illegal. The Government argues for expanding the ban on child pornography to prevent virtual images of sexuality from becoming a form of currency to trade for child pornography. Congress, however, doesn't have the power to ban money or credit cards because they are exchanged for child pornography. Likewise, Congress cannot outlaw constitutionally protected speech because of the possibility that a person will trade it for illegal material. A law already forbids people from selling child pornography, including computer generated images of identifiable children. (J.A. 34). This law, and others, criminalize the sale of pornography without violating the First Amendment. (J.A. 34). Congress should make the transaction's conduct illegal, not the lawful expression of ideas.

3. Shifting the burden to defendants to prove their innocence is scarcely compelling.

The Government argues that without these provisions of the CPPA, prosecutors will have difficulty proving whether a particular image used an actual child in its production, letting people who do produce images with actual children get away with it. (J.A. 39). This argument fails for two reasons. First, no evidence exists that if prosecutors fail to meet their evidentiary burden in cases where no child appears in the production, pedophiles will increase their abuse and more children will suffer. Second, reducing the Government's burden of proof cannot justify a categorical ban on protected speech.

The Government's argument about the difficulty of their burden does not hold. Even if the Government had evidence of cases where a defendant escaped conviction because prosecutors could not meet their burden, that does not justify a total suppression of all sexually explicit material that depicts images that "appears to be" or "conveys the impression" of minors. Congress should have focused on honing the defenses available to defendants in child pornography cases, and not on the suppression of First Amendment protected speech.

Further, Congress cannot shift the burden to the defendant to prove his or her innocence. The Government's attempt to reduce its burden is hardly a compelling argument because it shifts the burden to the defendant. *U.S. v. Jacobson*, 503 U.S. 540, 553 (1992) (holding that a compelling interest in protecting children from sexual abuse does not justify altering the general rules of criminal procedure).

C. Even if the Interest to Ban Non-Obscene Sexually Explicit Materials That Do Not Involve Children Were Compelling, the CPPA Fails Constitutionality Because It Is Not Narrowly Tailored.

The Court applies the strict scrutiny standard to content-based statutes, like the CPPA. *Playboy*, 529 U.S. at 813. In *Playboy*, the Court determined that because a regulation burdened

speech, "the lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values has no application to content-based regulations targeting the primary effects of protected speech." 529 U.S. at 815. Therefore, the *Playboy* Court applied the strict scrutiny standard. *Id.* Similarly here, the Government cannot prove that the CPPA is narrowly tailored to serve a compelling Government interest, and it therefore fails strict scrutiny.

The CPPA is unconstitutional because it is not narrowly tailored. In reaching its conclusion in *Ferber*, this Court focused on the clearly defined boundaries that rendered child pornography, like obscenity, unprotected by the First Amendment. 458 U.S. at 764. In this case, the CPPA does not clearly define the material it restricts, nor are the provisions narrowly tailored to cover a certain category of speech.

The clear line separating child pornography from other materials blurs when the government attempts to regulate materials simply because they contain youthful looking adults, or artificially generated images. The infringement of government regulation on free speech limits the free exchange of ideas, the very foundation of American ideals. The *Ferber* Court primarily concerned itself with the difficulty, "not only to assure that statutes designed to regulate obscene materials sufficiently defined what was prohibited, but also to devise substantive limits on what fell within the permissible scope of regulation." 458 U.S. at 755. The Court fears that "[l]ike obscenity statutes, laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy." *Ferber*, 458 U.S. at 756.

II. THE CPPA'S BLANKET SUPPRESSION OF FIRST AMENDMENT PROTECTED SPEECH RENDERS THE STATUTE UNCONSTITUTIONALLY OVERBROAD.

The CPPA currently bans sexually explicit material that the First Amendment protects. Specifically, the CPPA outlaws material that uses no actual children, but may incorporate

sexually explicit images of youthful-looking adults or entirely fictional characters. This Court banned depictions of child sexuality because of the harm children suffer during its making. *Ferber*, 458 U.S. at 763. Therefore, the CPPA bans material that this Court has never before considered child pornography. Several members of Congress also expressed concern for the CPPA's constitutionality at the time of its enactment. The CPPA has an ineffective affirmative defense because it provides no defense for many whose work or possessions may fall under the statute. For these reasons, the CPPA is facially and substantially overbroad.

A. The CPPA Is Substantially Overbroad Because It Bans Sexually Explicit Visual Depictions That Are Entirely Fictional or That Portray Youthful Looking Adults.

Currently the CPPA bans entirely constitutional material. The Government's argument that the CPPA bans only those materials that are "virtually indistinguishable" from child pornography fails because the "virtually indistinguishable" language appears nowhere in the statute. (J.A. 38). This term appears only in the general findings of the statute included as one of the historical and statutory notes contained in the annotated version of the United States Code. *Id.* This Court held that relying on language outside of a statute to explain its requirements does not provide a strong basis for its definition. *Natl. Org. for Women v. Scheidler*, 510 U.S. 249 (1994) ("The quoted statement of legislative findings is a rather thin reed upon which to base a requirement"). Therefore, the CPPA's plain language does not sufficiently narrow the statute to material that is "virtually indistinguishable" from child pornography.

The CPPA's reach is substantially and facially overbroad because it bans "any visual depiction" that "appears to be" or "conveys the impression" of a minor. 18 U.S.C. § 2256(8)(B), (D). Relying on this language of the statute, the CPPA expressly bans a broad range of images that are not "virtually indistinguishable" from child pornography. The CPPA's subsections 2256(8) A through D all refer to "visual depictions" yet this language actually contradicts the

"virtually indistinguishable" language the Government relies on to narrow the law. 18 U.S.C. § 2256(8)(B), (D). The CPPA includes the broader of these terms "visual depiction" in its plain language, while it omits the narrower "virtually indistinguishable" term. (J.A. 38). The Government's reliance on a term not within the CPPA to narrow it, highlights that the CPPA's language is not sufficiently narrow. 18 U.S.C. § 2256(8)(B), (D). The Government's statement that the CPPA applies to material "virtually indistinguishable" from child pornography cannot be true if the statute applies only to sexually explicit"visual depiction" that "appears to be" or "conveys the impression" of a minor. *Id.*

Specifically, several of the CPPA's provisions ban material that this Court does not consider child pornography. For example, subsection 2256(8)(B) bans sexual depictions of adults or fictional characters who "appear to be" minors and subsection 2256(8)(D) bans depictions of actual adults that producers may appear to promote as minors. In banning these materials the CPPA bans the material this Court protected in *Ferber*, because the CPPA bans far more than materials that harm children. 458 U.S. at 777. The CPPA's current construction applies to countless types of film, sculpture, photography, paintings, illustrations, and even to depictions of anatomically correct dolls. *Reno v. ACLU,* 521 U.S. 844, 877 (1997) (holding the CDA's "indecent" and "patently offensive" terms ban non-pornographic material with serious educational value). Similarly, the CPPA bans serious literary, artistic, scientific, and educational materials that are neither obscene nor harmful to children. For example, the CPPA includes within its reach such innocuous films as Lolita, Blue Lagoon, or Titanic, and historical texts with illustrations like the Karma Sutra. In addition, the CPPA's current sweep may allow law enforcement to arrest and prosecute the producers of an educational film about child sexual

abuse or the authors of medical literature containing visual depictions of minors engaged in sexual conduct.

The CPPA's overbroad sweep includes the potential prosecution of non-obscene depictions of sexual acts that do not involve a real child in any way. This Court banned child pornography because of the harm caused by its creation, and not for any of its consequences. *Ferber,* 458 U.S. at 777. For this reason, the CPPA's overbreadth is unconstitutional because it prohibits material that this Court gives First Amendment protection to, in particular, "non-obscene sexual expression that does not involve actual children." *Id.*

The logical extension of the Government's argument to ban virtual expressions of child sexuality, even when it only involves adults or entirely fictional characters, extends to a ban of any expression that "appears to be" or "conveys the impression" of a specific crime. This grant of power allows the Government to prosecute crimes in movies or plays that are entirely simulated and during which no one is harmed in any way. For example, under this broad-reaching discretion, the Government may prosecute the producers of the film Pulp Fiction for the harm of promoting the use of illegal drugs, or a production of Othello for the harm of promoting domestic violence and murder. The practical nullification of our First Amendment rights that these scenarios illustrate, demonstrates the troubling effect of the CPPA's overbreadth.

B. The CPPA's Congressional Findings Emphasize a Concern for Its Constitutionality Because It Is Overbroad and Directly Contravenes This Court's Ruling in *Ferber.*

The legislative record on the CPPA demonstrates that members of Congress themselves expressed concern about the statute's constitutionality due to its overbreadth. (J.A. 34, 52-61). According to Senator Kennedy, substantial evidence exists "to believe that the underlying bill is unconstitutional as applied to the depiction of adults, or as applied to computer-generated images

of fictitious children." (J.A. 56). Senator Simon voted to oppose the statute because of its unconstitutional overbreadth. (J.A. 57).

Specifically, the Congressional record reflects a concern, that the CPPA outlaws material that in no way uses a real child for their production. (J.A. 52). Senator Biden stated how this aspect of the CPPA directly contradicts this Court's holdings "by criminalizing all visual depictions that 'appear to be' child pornography—even if no child is ever used or harmed in its production—section 4 prohibits the very type of depictions that the Supreme Court has explicitly held protected." (J.A. 52). The CPPA contradicts this Court's reasoning in *Ferber*, which limits the prosecution of child pornography to visual depictions of actual children specifically to avoid the sexual abuse of children during its production. 458 U.S. at 762. However, much of the material the CPPA bans necessarily does not involve child abuse because there are no actual children in the material. The CPPA's scope reaches much farther than this Court deems constitutional.

C. The CPPA's Affirmative Defense Is Unfair and Ineffective Because It Necessarily Excludes Entire Classes of Artists, Producers, and Individuals From Using the Defense, Even When Their Material Falls Within the Statute.

The CPPA's affirmative defense provides no defense at all for various types of sexually explicit material that may look like they contain minors, including entirely fictional depictions or images of actual adults that appear to advertise images of minors. The CPPA's provides an affirmative defense if: 1) the alleged child pornography depicts an actual person or persons engaging in sexually explicit conduct; 2) each such person in the material was an adult at the time of production; and 3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct. 18 U.S.C. § 2252(A)(C).

The affirmative defense's requirement that producers or distributors prove that their material uses actual adults provides no defense for those who produce entirely fictional depictions. For example, Respondent Jim Gingerich who creates works that use no actual people and are the sole product of his imagination, cannot use this defense. (J.A. 3). Similarly, the defense does no protect producers and distributors of entirely computer-generated material that does not depict any identifiable people, but that are again, complete fabrications. The CPPA's affirmative defense is unfair and illogical because an artist that uses only a computer to produce an image may face a fifteen-year prison term under the statute, while a photographer who produces a similar image using an actual person will not. (J.A. 27).

In addition, the affirmative defense does not protect consumers and distributors that have no involvement in the production any material that the CPPA bans and that consequently, have no way of knowing the age of persons depicted or whether they are actual persons at all. Also, the CPPA applies to all material that law enforcement may find, without providing any temporal parameters for the prosecution of producers or possessors of such material. As a result, any material produced before its enactment is not exempt from penalty under the statute.

The affirmative defense further limits its already weak application because it does not protect all producers or distributors who can prove that they use actual adults in their material. The final provision of the defense does not provide a defense to defendants who only use actual adults, but whose product appears to "advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression of a minor engaging in sexually explicit conduct.", 18 U.S.C. § 2252(C)(3). Once again, the CPPA does not provide any guidance on how to determine that producers who only use actual adults in their material, promote or advertise it to involve minors. Also, the CPPA uses the undefined and overbroad term "convey

the impression" another time to describe a crime whose penalty extends to a fifteen-year prison term. 18 U.S.C. § 2252(C)(3).

Another troubling provision of the CPPA's affirmative defense states that the defense does not apply to those who have more than three sexually explicit images that appear to depict minors. (J.A. 27). Yet again, this defense is useless to many producers, distributors, and even individuals who may possess large quantities of sexually explicit conduct that may violate the statute based on the personal opinion of a law enforcement official. For example, this provision does not provide a defense for Respondent Bold Type Inc., whose books on nudism might appear to depict minors to some, nor to Respondents Gingerich and Raffaelli whose paintings or photographs all may be misconstrued to depict minors. (J.A. 3). Individuals may not use the affirmative defense either under this provision because it applies to the public at large. An individual may face prosecution if officials find more than three books or films in a personal collection that may appear to depict minors engaging in sexually explicit conduct. This provision does not provide a secure defense for those who do possess three or fewer items either because they must destroy or forfeit their items in order to avoid prosecution.

III. THE PROVISIONS "APPEARS TO BE" AND "CONVEYS THE IMPRESSION" ALSO FAIL FOR VAGUENESS BECAUSE THEY DO NOT GIVE THE PUBLIC OR LAW ENFORCEMENT NOTICE OF PROHIBITED CONDUCT.

The CPPA is unconstitutionally vague because it does not define to whom material must appear to or convey the impression of a minor engaging in sexually explicit conduct. These provisions are inherently subjective because they fail to define a clear criminal offense. The CPPA's vagueness violates due process laws by its failure to provide fair notice and permits arbitrary and discriminatory enforcement of the statute. The CPPA's vagueness also has the effect to chill entirely protected speech out of fear of prosecution.

A. The CPPA's Terms "Appears To Be" and "Conveys The Impression" Are Unconstitutionally Vague Because They Fail to Expressly Define Any Criminal Offense.

The CPPA's subsections 2256(8)(B) and 2256(8)(D) are vague because the terms "appears to be" and "conveys the impression" give no guidance to the ordinary person about the conduct the statute prohibits. 18 U.S.C. § 2256(8)(B), (D). A statute is unconstitutionally vague based on an objective standard when it does not clearly define a criminal offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited" *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). No ordinary person can understand the prohibited conduct of the CPPA because it does not identify any explicit offense, nor who or what determines which material "appears to be" or "conveys the impression" of a minor. The CPPA's failure to define these basic terms is sufficiently vague because it leaves this crucial question entirely open-ended and provides no guidance to the ordinary citizen.

The CPPA does not provide a single standard by which to determine what "appears to be" or "conveys the impression" of a minor, nor does the statute refer to any standard established by this Court. *Free Speech,* 198 F.3d at 1083. The absence of a standard to determine the age someone appears to be further emphasizes the statute's vagueness, because the appearance of age, like beauty, is subjectively in the eye of the beholder.

Even if the CPPA did provide a standard to determine age, the question would remain as to whose standards apply. An objective standard cannot apply because it does not resolve the issue of who determines that material "appears to be" or "conveys the impression" of a minor. Reasonable persons will differ on the issue of what a minor looks like and disparities in the statute's enforcement will result. The use of community standards will also lead to a highly inconsistent enforcement of the CPPA that is not, in fact, objective at all. Standards differ

significantly from community to community. Cultural, ethnic, and political differences all shape one's perception of what a minor looks like. The disparities present in how to determine what "appears to be" or "conveys the impression" of a minor by any standard highlight the vagueness of the CPPA's provisions.

The terms "appears to be" and "conveys the impression" are inherently subjective terms to which an objective standard cannot apply. No objective standard exists to determine the appearance of age. These terms, however, are inherently subjective when applied to any kind of determination, because they rely entirely on perceptions for which there are no guidelines. This Court held that inherently subjective terms are unconstitutionally vague. *City of Chi. v. Morales,* 527 U.S. 41, 55 (1999) (holding "no apparent purpose" standard used to define loitering was "inherently subjective" because it relied solely on the officer at the scene to determine whether a purpose is "apparent" or not). Similarly, the terms "appears to be" and "conveys the impression" are inherently subjective because they also rely solely on the law enforcement officers who first view material to determine whether it "appears to be" or "conveys the impression" of a minor.

The Government argues that the CPPA is not vague because it criminalizes material that is "virtually indistinguishable" from child pornography to the "unsuspecting viewer" although these phrases appear nowhere in the statute. (J.A. 40). The Government's need to use words not in the statute to describe its meaning greatly emphasize the statute's unclear terms and its failure to define these terms. Nevertheless, the phrase "virtually indistinguishable" does not clarify the terms "appears to be" and "conveys the impression" because again it only describes yet another subjective determination. Also the term "unsuspecting viewer" emphasizes the statute's subjectivity because there is no guidance to help determine the "unsuspecting viewer." This

standard cannot be equivalent to the reasonable person of the objective standard, otherwise there is no need for a separate standard. For these reasons, the CPPA is unconstitutionally vague.

B. Due to Its Vagueness the CPPA Is Unconstitutional Because It Fails to Provide Fair Notice in Violation of Due Process Laws.

The CPPA violates due process laws due to the vagueness of the terms "appears to be" and "conveys the impression." ("The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.") *In re Winship*, 397 U.S. 358, 364 (1970). A vague statute violates due process because it does not clearly identify the basis of conviction to those who may be vulnerable to its provisions. *Osborne v. Ohio*, 495 U.S. 103, 119 (1990). Accordingly, statutes "so vague that prosecuting a person under the statute would effectively deprive that person of due process of law" is unconstitutional. *Kolender*, 461 U.S. at 357-58.

The CPPA's terms "appears to be" and "conveys the impression" violate due process because the trier of fact under the statute will have to rely on a highly subjective assessment of what material appears to be depict. As discussed, separate communities are likely to vary in their perceptions of what appears to depict a minor, indeed, separate individuals are likely to vary on the issue also. Law enforcement officials, juries, and judges must determine whether material "appears to be" or "conveys the impression" of a minor solely on their personal sense of the images. The CPPA's violation of due process laws strongly affects the public as well, because the statute amends former Federal law to increase penalties for its offenders. (J.A. 30). For this reason, the CPPA does not provide fair warning to those who may unintentionally violate it and face a potential ten-year prison term. (J.A. 27).

C. The Vagueness of the CPPA's Terms "Appears To Be" And "Conveys The Impression" Permit Arbitrary and Discriminatory Enforcement of the Statute.

The CPPA's failure to provide precise definitions or standards to apply defers the statute's meaning to public officials and results in law officials having unfettered discretion in the arrest and prosecution of individuals under the statute. No other standard exists for a clear definition of these terms. The reliance on individual law enforcement officers to determine what an image depicts will lead to arbitrary and discriminatory enforcement of the statute. As a result, law enforcement officials are the only authority that can determine which material falls under the statute and they will determine this entirely on their subjective impressions. Consequently, officials will enforce the CPPA inconsistently because its enforcement is entirely discretionary. The vagueness of a statute raises special constitutional concerns because of its "obvious chilling effect on free speech." *Reno*, 521 U.S. at 872. Severe criminal penalties are likely to cause the public, in particular artists, to self-censor their own speech, ideas, or images. *Id.* This deterrent effect, along with a high risk of discriminatory and arbitrary enforcement, poses a serious threat to First Amendment rights. *Id.* The CPPA's vague provisions pose this serious threat on all artistic, scientific, and educational communities, as well as on the public at large.

IV. THE CPPA IS INEFFECTIVE AND DELAYS THE PROTECTION OF CHILDREN BECAUSE IT IS CONSTITUTIONALLY VAGUE AND OVERBROAD.

A statute designed to protect children that contains vague and overbroad language only serves to counter that aim due to its in effectiveness. According to Senator Biden, "Enacting a statute of questionable constitutionality is counterproductive to the strict enforcement of laws against pedophiles and child molesters." (J.A. 53). Specifically, the CPPA's vague and overbroad language will result in the delay of its enforcement due to litigation on its constitutionality. (J.A. 53).

In addition, many resources that exist to help combat child pornography are wasted on determining the constitutionality of the CPPA. (J.A. 53). Narrowing the CPPA can better protect children by preserving government resources, and saving time. Until then, the vagueness and overbreadth of the CPPA's terms "appears to be" and "conveys the impression" delay the protection of children due to their unconstitutionality. In order to protect children more swiftly and effectively the CPPA must clearly define the criminal offenses it outlaws.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court AFFIRM the judgment of the United States Court of Appeals for the Ninth Circuit.

Dated: October 31, 2001

Respectfully submitted,

Counsel for Respondents